

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

PLATINUM MANAGEMENT (NY) LLC;  
PLATINUM CREDIT MANAGEMENT, L.P.;  
MARK NORDLICHT; DAVID LEVY; DANIEL  
SMALL; URI LANDESMAN; JOSEPH MANN;  
JOSEPH SANFILIPPO; and JEFFREY SHULSE,

Defendants.

Case No. 16-CV-6848 (BMC)

**OPPOSITION TO RECEIVER'S MOTION FOR AN ORDER (I) PERMANENTLY  
ENJOINING ANY PROSECUTION OF CLAIM NO. 145, (II) CONFIRMING THE  
RECEIVER'S DISALLOWANCE OF CLAIM NO. 145, AND (III) CONFIRMING THE  
RECEIVER'S AUTHORITY TO CONSENT TO THE RELEASE OF THE INDEMNITY  
ESCROW AMOUNT**

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Rachelle Frisby and John Johnston of Deloitte Ltd., in their capacities as the joint provisional liquidators and authorized foreign representatives (“JPLs”) of PB Life and Annuity Co., Ltd. (“PBLA”) and Omnia, Ltd. (“Omnia”), objectors herein (together, “Objectors”), hereby oppose the motion of Melanie L. Cyganowski, receiver for the Receivership Entities<sup>1</sup> (“Receiver”) to: (1) disallow Claim No. 145 (the “Claim”) and permanently enjoin prosecution of said Claim; and (2) release the indemnity escrow amount (the “Motion”), and respectfully state:

### **PRELIMINARY STATEMENT**

1. Each of the Objectors hold viable claims against one or more of the Receivership Entities, in the amount of at least \$4,530,155.68,<sup>2</sup> stemming from the loans comprising the Claim, secured by liens on the Receivership Entities’ respective assets.<sup>3</sup>

2. BAM Administrative Services, LLC (“BAM”) was the agent on said loans. Apparently serving in that capacity, and without the Objectors’ knowledge, BAM filed the Claim at issue in the Motion. Thereafter, BAM, whose operations were closed down as a result the fraud detailed in the Receiver’s own Amended Complaint in the Fraud Action (defined below),<sup>4</sup> failed

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<sup>1</sup> “Receivership Entities” shall mean: Platinum Credit Management, L.P.; Platinum Partners Credit Opportunities Master Fund LP; Platinum Partners Credit Opportunities Fund (TE) LLC; Platinum Partners Credit Opportunities Fund LLC; Platinum Partners Credit Opportunities Fund (BL) LLC; Platinum Partners Credit Opportunities Fund International Ltd; Platinum Partners Credit Opportunities Fund International (A) Ltd; Platinum Liquid Opportunity Management (NY) LLC; Platinum Partners Liquid Opportunity Fund (USA) L.P.; Platinum Partners Liquid Opportunity Master Fund L.P.

<sup>2</sup> The JPLs have been without complete books and records, of which has been a point of contentious litigation since their appointment. Given the incomplete books and records in the JPLs possession, it is known that PBLA and Omnia are entitled to an amount that is at least equal to their rightful share of Claim 145. The JPLs reserve any and all rights to pursue the full amount of claims for which each are entitled to, which may exceed PBLA and Omnia’s share of Claim number 145. Further, this Objection shall not constitute a waiver of any claims on behalf of the Objectors against any of the Receivership Entities and/or SHIP. *See e.g.*, the following pleadings in the Bankruptcy Case (defined below): *Motion for a Further Order Compelling Turnover of Books and Records and Attorney Files Pursuant to 11 U.S.C. §§ 105, 542, 1519(a)(3), 1521(a)(4) & 1521(a)(7)* (the “Motion to Compel”) [ECF No. 47], the Respondents’ Opposition to the Motion to Compel [ECF No. 52]; and the JPLs’ Reply in Support of the Motion to Compel [ECF No. 63].

<sup>3</sup> Calculations of PBLA’s and Omnia’s claims are annexed as composite **Exhibit A** to the Declaration of Rachelle Frisby, filed contemporaneously herewith.

<sup>4</sup> *See infra* Section II.

to take any further action to protect the Claim in the face of the Receiver's objection to same, to the prejudice of the Objectors.

3. The Receiver asserts that because no party objected to the initial Order Establishing Claims and Interest Reconciliation and Verification Procedures (the "Claims Process Order") [ECF No. 554],<sup>5</sup> the Claim should be permanently disallowed, and that the indemnity escrow amount should now be released. Motion, at pg. 4–5, 8, 11–12. While the Receiver is correct that BAM failed to perform its duty as agent and object to the Receiver's disallowance of the Claim, the Objectors respectfully request that the Motion be denied, and that the JPLs be allowed to submit claims on behalf of each of the Objectors and be given the opportunity to prosecute the validity of these claims.

4. In an effort to amicably resolve this dispute, the JPLs and the Receiver exchanged information to allow the JPLs to substantiate their respective claims. The Receiver did not agree with the Objectors' assessment. Consequently, the Objectors file the instant opposition.

**I. The Motion Violates The Stay Imposed By Chapter 15 Of The Bankruptcy Code.**

5. In 2020, the Bermuda Monetary Authority filed petitions to wind up PBLA and Omnia; those proceedings are currently pending before the Supreme Court of Bermuda (the "Bermuda Court"), Companies (Winding Up) Commercial Court, 2020: No. 306 and 305, respectively (the "Bermuda Proceedings"). By separate Orders of the Bermuda Court dated September 25, 2020, the JPLs were appointed as provisional liquidators (collectively, the "Bermuda Orders").<sup>6</sup>

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<sup>5</sup> The Receiver completely disallowed the Claim.

<sup>6</sup> True and correct copies of the Bermuda Orders are annexed as composite **Exhibit A** to the Declaration of Constantine D. Pourakis, filed contemporaneously herewith ("Pourakis Decl.").

6. The Bermuda Orders grant to the JPLs broad and ongoing authority to undertake various actions with respect to each of the Objectors, including to do all such things as may be necessary or expedient for the protection of the Objectors' respective property or assets located in the United States. *Pourakis Decl.*, **Exhibit A** at ¶ 4.

7. On December 3, 2020 (the "Petition Date"), the JPLs filed separate voluntary petitions under Chapter 15 of Title 11 of the United States Code (the "Bankruptcy Code"), before the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"),<sup>7</sup> on behalf of PBLA and Omnia, seeking recognition of the Bermuda Proceedings as foreign main proceedings and related relief under Bankruptcy Code sections 1520 and 1521. On January 5, 2021, the Bankruptcy Court entered an Order granting recognition of the PBLA and Omnia Bermuda Proceedings as foreign main proceedings (the "Recognition Order").<sup>8</sup>

8. "Upon recognition of a foreign proceeding that is a foreign main proceeding— sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States." 11 U.S.C. § 1520 (a)(1). Bankruptcy Code section 362 imposes a stay, applicable "to all entities" which protects all of the Objectors' estate property and the jurisdiction of the Bankruptcy Court by barring, among other things "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

9. Furthermore, the Recognition Order specifically provides, "[a]ll provisions of section 1520 of the Bankruptcy Code apply in these Chapter 15 Cases, including, without limitation, the stay under section 362 of the Bankruptcy Code throughout the duration of these Chapter 15 Cases or until otherwise ordered by this Court." *Pourakis Decl.*, **Exhibit B** at ¶ 3.

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<sup>7</sup> *In re PB Life and Annuity Co. Ltd., et al*, Case No. 20-12791 (LGB) (the "Bankruptcy Case").

<sup>8</sup> See *Pourakis Decl.*, **Exhibit B**.

10. The Objectors are debtors in active foreign main proceedings pending before the Bermuda Court and the Bankruptcy Court. As a result, enforcement of Bankruptcy Code section 362 is necessary to protect the stay imposed upon the Bankruptcy Court's recognition of the Bermuda Proceedings.

11. The enforcement of the Claim disallowance is an attempt to obtain possession of the property of the Objectors' respective bankruptcy estates, or at the very least, an attempt to exercise control of the property of the estate – the interests secured by the Objectors' loans to the Receivership Entities – by disallowing the Objectors' secured interests without affording the Objectors an opportunity to protect their interests. By doing so, the Receiver's action will harm PBLA and Omnia creditors, all of whom would be entitled to a distribution of whatever monies the Objectors receive from the Receivership Entities.

12. It cannot be disputed that the Claim is property of the respective estates of PBLA and Omnia; they are secured lenders on loans to the Receivership Entities. If the Receiver disallows the Claim, the estates and the benefit to the Objectors' respective creditors will be significantly harmed.

13. As a result, disallowance of the Claim, and the subsequent release of the escrow account, would be an impermissible exercise of control of the Objectors' estate property, violating 11 U.S.C. § 362(a)(3). The Objectors respectfully request the Court deny the Motion.

**II. The Objectors Should Not Be Prejudiced By BAM's Failure To Protect The Claim and the Objectors Satisfy the *Pioneer* Factors.**

14. Should the Court find the Motion does not violate the stay under the Bankruptcy Code, it nonetheless would be unfair to grant the Receiver's Motion without allowing the Objectors an opportunity to assert and prove the quantum and validity of their claims.

15. The Objectors recognize to effectively assert and prove the validity of their claims, this would require a filing of a revised claim after the expiry of the deadline set by the Court.

16. The propriety of allowing a late filing is governed by *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). The *Pioneer* test is one of excusable neglect. The burden to prove excusable neglect rests with the party seeking to file the late filing. *Midland Cogeneration Venture L.P. v. Enron Corp. (In re Enron Corp.)*, 419 F.3d 115, 121 (2d Cir. 2005).

17. The *Pioneer* test applies to receiverships. In fact, this Court in this action found the *Pioneer* test is to be used when a “party moves for permission to act after having missed a deadline.” *SEC v. Platinum Management (NY) LLC*, No. 16-cv-6848 (BMC), 2018 WL 4623012, at \*1, n.11 (E.D.N.Y. Sept. 26, 2018). Thus, the *Pioneer* factors, while traditionally arising in the context of bankruptcy, are applicable in the instant matter before this Court.

18. A two-part test is used to determine whether excusable neglect exists. First, the Court must determine whether failure to act was due to neglect, not a conscious or deliberate decision. Neglect occurs due to “inadvertence, mistake, or carelessness, **as well as by intervening circumstances beyond the party’s control.**” *In re Global Aviation Holdings Inc.*, 495 B.R. 60, 64 (Bankr. E.D.N.Y. 2013) (citing *Pioneer*, 507 U.S. at 388) (emphasis added).

19. Second, the Court must determine whether the neglect was excusable. Whether the neglect is deemed excusable is an equitable inquiry, “taking account of all relevant circumstances surrounding the party’s omissions.” *Id.* (citing *Pioneer*, 507 U.S. at 395). When looking at the totality of the circumstances, the Court looks to four factors: (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its potential impact on court proceedings; (3) the reason for the delay, including whether it was within the movant’s reasonable control; and (4) whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395.



20. While prejudice, length of delay, and good faith will likely have more relevance in a close case, the reason for the delay, including whether the movant had reasonable control over the delay, is given more weight in determining whether to allow a late filing. *In re Global Aviation Holdings Inc.*, 495 B.R. at 65 (citing *In re Enron*, 419 F.3d at 123) (movant's deliberate choice not to file a proof of claim did not constitute excusable neglect); see *In re Trocom Construction Corp.*, No. 1-15-42145-nhl, 2016 WL 4575546, at \*1, \*3 (Bankr. E.D.N.Y. Sept. 1, 2016).

21. Moreover, an agent cannot bind his principal, even in matters touching his agency, where the agent is known to either, be acting for himself, has an adverse interest, or otherwise known to be a bad actor. *Hidden Brook Air, Inc. v. Thabet Aviation Int'l Inc.*, 241 F. Supp. 2d 246, 262 (S.D.N.Y. 2002). Said differently, a principal remains liable on a contract made by the agent if the third party with whom the agent deals with has no knowledge of the agent's faults nor is cognizant of any fact charging the third party with such knowledge. *Id.* (citing 2A N.Y. Jur.2d Agency and Independent Contractors § 279).

22. BAM, as agent for the Objectors, filed the Claim on or about March 28, 2019; the JPLs do not believe BAM advised either of the Objectors that the Claim was filed. The Receiver then filed her report disallowing the Claim on November 13, 2020 [ECF Nos. 548, 549 and 550];<sup>9</sup> again, BAM did not advise the Objectors. Now, the Receiver, by operation of the Claims Process Order, seeks to disallow the Claim in its entirety. Unfortunately, every step of the way BAM failed to protect the validity of the Claim and keep the Objectors apprised. BAM's inaction adversely impacted each of the Objectors without their knowledge.

23. It is obvious that BAM, as the Objectors' agent, failed to act in a prudent manner to preserve the Objectors' rights as it relates to the Claim. To exacerbate the issue further, despite

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<sup>9</sup> Subsequently, on December 1, 2020, the Court granted the Claims Process Order. [ECF No. 554]

the JPLs contacting the Receiver's counsel in late February 2022 for a general update on the receivership action, no mention was made of the Receiver's determination as to the Claim. Instead, about three weeks later, the Receiver filed the Motion.

24. BAM's failure to submit an objection on behalf of the Objectors satisfies the first prong of the *Pioneer* test – neglect – because this failure to file an objection was outside of the Objectors' control. *See In re Global Aviation Holdings Inc.*, 495 B.R. at 64.

25. As for the second prong of the *Pioneer* test, whether the neglect was excusable, the reason for delay is critical. Here, the reason for the delay was through no fault of the Objectors. There was no deliberate decision not to file opposition to the Receiver's claims disallowance; rather the Objectors were completely blindsided when they found out that not only was the Claim filed on their behalf, that an entire claims process was going on of which they were unaware, and that when their claims were adversely impacted, BAM did not prudently act to respond to same.

26. As the Second Circuit makes clear, the nature and reason for the delay is given considerable weight. *In re Global Aviation Holdings Inc.*, 495 B.R. at 65. The nature and the reason, here, is because BAM, itself the subject of fraud allegations and judgments,<sup>10</sup> failed to file a timely objection.<sup>11</sup> To further their fraudulent intentions, both actual and constructive, BAM failed to file a timely objection or revised claim. To do so would have preserved the Objectors

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<sup>10</sup> *See* action styled as *Cyganowski v. Beechwood Re Ltd.*, 18-12018 (S.D.N.Y.) (the "Fraud Action"). Pursuant to the Fraud Action Amended Complaint, the Receiver brought claims against BAM for, *inter alia*: "Aiding and Abetting Breach of the Fiduciary Duty" [Fraud Action ECF No. 83, at ¶¶ 322–333]; "Aiding and Abetting Common Law Fraud" [Fraud Action ECF No. 83, at ¶¶ 334–340]; "Actual Fraudulence Conveyance in Violation of NYDCL" [Fraud Action ECF No. 83, at ¶¶ 341–354, 375–390]; and "Constructive Fraudulence Conveyance in Violation of NYDCL" [Fraud Action ECF No. 83, at ¶¶ 355–374, 391–416].

<sup>11</sup> For purposes of completeness, the Objectors meet the other three prongs of the excusable neglect test; (i) the length of the delay is minimal; (ii) there is no prejudice to the Receiver because the Receiver has been aware of this Claim since 2019, thus, objections to disallowance of the Claim would naturally follow the Motion; and (iii) the Objectors are filing this opposition and request to file claims in good faith to correct a failure of their agent who was not acting in their best interests.

rights, and this preservation of rights would have negatively affected BAM's own interest, hence why BAM failed to act.

27. As the Receiver is aware BAM has previously acted in a manner that was "willfully, grossly, recklessly and wantonly negligent, and without regard for the PPCO Funds' rights and interests..." *Fraud Action Am. Compl.*, at ¶¶ 333, 340. Given the seriousness of the allegations set forth against BAM in *her own action*, and when it comes to her obligations in this instant action to dutifully notify potential claimants of the deadline to file an objection to the Claims Process Order, the Receiver conveniently ignores BAM's previous malfeasance. Incredibly, despite BAM's previous malfeasance, the Receiver attempts to leave the Objectors without rights – the same situation the Receiver and the Receivership Entities recently found themselves in (hence the filing of the Fraud Action).

28. BAM, as agent, cannot bind the Objectors as principals, because as of the date of the Claims Process Order, the Receiver knew and was aware that BAM was a bad actor because the Fraud Action against BAM, *inter alia*, for actual and constructive fraudulent conveyances. Therefore, the Receiver knew that BAM, similar to the Fraud Action, was likely motivated by adverse interests – to further its own fraudulent intentions – in not filing opposition to the Receiver's disallowance of the Claim.

29. As the Court held in *Hidden Brook*, this knowledge *de facto* negates any binding effect of BAM's inactions, namely BAM's failure to file opposition on behalf of the Objectors in the prescribed time limit set forth in the Claims Process Order, because at that point, the Receiver knew that BAM was a bad actor, and that BAM was likely acting in further interests adverse to the Objectors' interests.

30. Last, the simple fact the Receiver filed the instant Motion, giving the Objectors an opportunity to preserve their rights as it relates to the Claim makes it obvious that the Receiver recognized there was likely some foul play, more than a miscommunication or oversight, as it relates to the Objectors' Claim and their preservation of such rights. The Motion is an explicit acknowledgement by the Receiver that due process was not afforded the Objectors, and the Motion is the Receiver's way of ameliorating this defect. Now that the Motion has opened this avenue of resolution, the Objectors should be allowed to follow through on this invitation and have their claims litigated.

31. The Receiver asks to release over \$4.5 million to Senior Health Insurance Company of Pennsylvania ("SHIP") without first establishing a *prima facie* case for her conclusion in her Report that the Objectors' claims would be disallowed as the product of fraudulent conveyances. *See* Motion at page 4. This escrow amount was set aside specifically for the Objectors' claims, and as described above, the Objectors provided the Receiver with evidence that they hold valid claims against the Receivership Entities.

32. The release of this escrow to SHIP, which would be a source of moneys for eventual distribution to the Objectors' creditors, cannot be allowed given the current state of play. The Objectors must be given their opportunity to present and validate their claims, not have their claims unilaterally disallowed by the Receiver and without review by this Court.

33. Notwithstanding the Receiver's lack of foundation as it relates to the alleged fraudulent conveyance claim, SHIP should not be able to gratuitously obtain over \$4.5 million simply because of a technicality, of which the Objectors are at no fault and the Receiver recognizes by the simple fact that the Motion was filed to provide the Objectors an opportunity to present and litigate the validity of their claims.

34. While the Objectors understand and appreciate there was no formal response or objection in connection with the Claims Process Order, that was completely due to BAM's inaction and, frankly, malfeasance. The Objectors should not be prejudiced by BAM's failure to act in the best interest of the Objectors.

35. As described above, the JPLs submitted evidence to the Receiver of the Objectors' ownership of the loans at issue in the Claim and the amount owed under the loans. As a result, the Objectors respectfully request that the Court allow time, as directed by the Court, for the JPLs to file formal claims on behalf of each the Objectors and for the Receiver and JPLs to litigate the validity of same.

36. Further, the Objectors ask the Court to deny the release of funds from the indemnity escrow account until the validity of the claims is resolved, as it would prejudice the Objectors and render any claims litigation moot.

**WHEREFORE**, the Objectors respectfully request the Receiver's Motion be denied entirely. Alternatively, the Objectors ask that the Motion be adjourned to allow JPLs to submit new claims on behalf of each of the Objectors and prosecute the validity of said claims.

Dated: New York, New York  
June 14, 2022

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